IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHANNA NELSON,
Plaintiff in Error,

—vs—

W. W. CASEY, HENRY SHATTUCK, and ALLEN SHATTUCK,
Defendants in Error.

No. 3698

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR

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Defendants in error have received a copy of the brief of plaintiff in error since they prepared their original brief herein, and now desire to supplement their former brief by calling the court's attention to certain inaccurate statements of fact, and erroneous application of law contained in the brief of plaintiff in error.

On page 1 the following recital appears:

> "It is further alleged that plaintiff was ignorant of the fact that the creek was subject to freshets, ignorant of the fact that the channel had been changed, ignorant of the fact that the bulkhead on her side of the creek was so weak that it would not withstand the water or that it was likely to be washed away" (pp. 18 and 19)"—

but the amended complaint does not allege that plaintiff was ignorant of the fact that Gold Creek was subject to freshets.

On page 6 of her brief plaintiff in error states:

> "When plaintiff purchased her property on the left or east bank of the new channel, she did so as a stranger in the country and without knowing that the channel was new, essentially artificial, and insufficient in capacity, etc."

The amended complaint does not allege that when plaintiff in error purchased her property she did so as a stranger in the country, nor does it allege that she did so without knowing the insufficiency of the new channel to convey the waters of the creek.

On page 10 of her brief plaintiff in error says:

> "In the case at bar it is alleged that plaintiff knew nothing about the change in the channel, the inadequacy of the new channel or the

> defects in the bulkheads; nor did she know the susceptibility of Gold Creek to freshets, and had no conception of the danger to which she subjected herself when she purchased her property.''

The amended complaint does not allege that plaintiff in error knew nothing of the inadequacy of the new channel, nor does it allege that she knew nothing of the susceptibility of Gold Creek to freshets.

In the absence of any allegation to the contrary, it must be assumed that plaintiff in error was equally as familiar with the periodical freshets of Gold Creek as were the defendants.

All the cases cited on page 7 of the brief of plaintiff in error deal with instances where the defendants sold articles which they knew to be dangerous to human life unless carefully handled, and were held liable to third parties for injuries sustained on account of defendants' negligence in failing to properly indicate the dangerous character of the packages containing such articles. But such cases have no application to the facts in the case at bar, as the authorities cited later in this brief will conclusively show.

The facts in the cases cited on page 9 of the brief of plaintiff in error bear no analogy to the facts in this case. In each of those cases the defendants were in control and possession of the defective streets and structures at the time such defects occasioned the damages complained of.

The cases cited on pages 14 and 15 in the brief of plaintiff in error are not applicable here, for in each of those cases the plaintiff had purchased his property prior to the construction of the dam, flume or canal, the defects of which caused the danger complained of, or such dam, flume or canal was maintained by the defendants at the time of the damage occasioned by the alleged defects of such dam, flume or canal.

Plaintiff in error cites Eikland vs. Casey, 266 Fed. 821, a case recently decided by this court. We submit the conclusion reached by the court in that case can have no controlling effect here, for in that case the plaintiffs purchased the land and built the house thereon prior to the building of the dam. In a recital of the facts in the last case cited this court said:

> "After the plaintiffs had built a house and improved their property, defendants built a

dam or bulkhead across the creek at a point approximately opposite the plaintiffs' lot, and from the dam, and from a point opposite and across the stream, constructed bulkheads of logs and stone to Gastineau Channel at a point to the southeast, thus changing the course of the stream and deflecting it to the southeast in a curve around the west and south sides of plaintiffs' lots."

In the case at bar the plaintiff in error purchased her property long subsequent to the construction of the dam and bulkheads.

The amended complaint shows no contractual relations existing between plaintiff and defendant in error. In the absence of such relationship there can be no liability for alleged damage caused by mere acts of negligence.

"The rule is that an action for negligence will not lie unless the defendant was under some duty to the injured party at the time and place where the injury occurred, which he has omitted to perform." Daugherty vs. Herzog (145 Ind. 255), 32 L. R. A. 837.

"The true rule, which we think applicable to it, may be found in Wharton on Negligence, Sec. 439. It is as follows: 'There must be causal connection between the negligence and the hurt, and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency.

Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt while passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable upon his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection."

"A contractor after the completion and delivery of possession of a building and its acceptance by the owner is not liable to a stranger to the contract for injuries resulting from defects in the construction of the building." Curtain vs. Somerset (140 Pa. 70), 12 L. R. A. 322.

Heizer vs. Kingsland & Douglass Mfg. Co., (110 Mo. 605), 15 L. R. A. 821.

McCaffrey vs. Mossberg & Granville Manufacturing Company (50 Atl. 651), 55 L. R. A. 822.

"The general rule is that a contractor, manufacturer or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of the articles he handles."

Huset vs. J. I. Case Threshing Mach. Co., 120 Fed. 865, at pages 867 and 868.

"So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause—the responsible human agency of the purchaser —without which the injury to the third person would not occur, intervenes, and, as Wharton says, 'insulates' the negligence of the manufacturer from the injury to the third person." Huset vs. J. I. Case Threshing Mch. Co., *supra.*

In the case last cited the court exhaustively discusses the liability of the third parties who have no contractual relations with the plaintiff and cites many authorities to the effect that there can be no liability for simple acts of negligence where there is no contractual relations between the plaintiff and the defendant, except in the three following instances:

1. An act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life.

2. An owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises.

3. One who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated.

It is true in the Huset case the Circuit Court of Appeals for the Eighth Circuit reversed the trial court for sustaining a demurrer to the complaint, but the complaint alleged that the defect in the machinery which occasioned the injury was purposely concealed by the defendants, and the court in the closing paragraph of its opinion said:

> "It is perhaps improbable that the defendant was possessed of the knowledge of the imminently dangerous character of this threshing machine when it delivered it, and that upon the

trial of the case it will be found to fall under the general rule which has been announced in an earlier part of this opinion. But upon the facts alleged in this complaint, the act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of any one who sustained injury therefrom."

In the case at bar the amended complaint does not allege any fraud, deceit or concealment on the part of the defendants; nor does it allege ignorance on the part of the plaintiff of the character of Gold Creek and its periodical freshets; nor does it allege that the insufficiency of the bulkheads and dam to withstand the force of the waters of such freshets was not obvious to one familiar with the character of Gold Creek.

Plaintiff purchased her property subsequent to the construction of the bulkheads and dam and must have been as familiar with Gold Creek as the defendants because the contrary is not alleged. She was, therefore, just as capable of determining for

herself whether the dam and bulkheads and new channel were sufficient to safeguard her property as were the defendants.

We think the judgment of the trial court correctly declared the law and therefore should be affirmed.

Respectfully submitted,

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